IN THE

Supreme Court of the United States

October Term, 1977
No. 77-2

WILLIAM C. WAGGONER, JOHN L. CONNOLLY, HOWARD C. DENNIS, WILLIAM SCHMIDT, and (as successors-in-interest to C. WILLIAM BURKE, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E. MEIR, JAMES J. KIRST, WILLIAM JERECZEK and E. J. STRECKER) FRANK L. TODD, FREEMAN M. ROBERTS, DALE I. VAWTER, WILLIAM A. COBB, JR., JOHN BEBEK, JERALD B. LAIRD, JOHN C. MAXWELL and ALEXANDER RADOS, *as Trustees of the Operating Engineers Health and Welfare Fund;* JOHN L. CONNOLLY, WILLIAM C. WAGGONER, C. V. HOLDER, HOWARD C. DENNIS, JAMES J. KIRST, JOHN C. MAXWELL, and (as successors-in-interest of JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, ALFRED HARRISON, WILLIAM JERECZEK, E. J. STRECKER, DONALD E. MEIR, and C. WILLIAM BURKE) FRANK L. TODD, FREEMAN M. ROBERTS, DALE I. VAWTER, WILLIAM A. COBB, JR., JOHN BEBEK, and KENNETH J. BOURGUIGNON, *as Trustees of the Operating Engineers Pension Trust;* WILLIAM C. WAGGONER, HOWARD C. DENNIS, C.I.T. JOHNSON, JAMES J. KIRST, ALEXANDER RADOS, and (as successors-in-interest of JOSEPH H. SEYMOUR, RICHARD L. CORBIT, C. WILLIAM BURKE, HAROLD EDWARDS, DONALD E. MEIR, WILLIAM JERECZEK and E. J. STRECKER) FRANK L. TODD, FREEMAN M. ROBERTS, DALE I. VAWTER, WILLIAM A. COBB, JR., JOHN BEBEK and JERALD B. LAIRD, *as Trustees of the Operating Engineers Vacation-Holiday Savings Trust;* WILLIAM SCHMIDT, HOWARD C. DENNIS, C.I.T. JOHNSON, ALEXANDER RADOS, and (as successors-in-interest of JOSEPH H. SEYMOUR, RICHARD L. CORBIT, KENNETH DODY, WILLIAM JERECZEK, ROBERT R. MOODIE, ALLAN ROBERTS, RICHARD GANNON and JERRY TRENT) DALE I. VAWTER, FRANK L. TODD, WILLIAM C. WAGGONER, FREEMAN M. ROBERTS, VERNE W. DAHNKE, WILLIAM A. FLOYD, ROBERT LYTLE and JOHN BEBEK, *as Trustees of the Southern California Operating Engineers Apprentice Training Trust;*

and

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12; *Petitioners,*

vs.

GRIFFITH COMPANY; J. W. NICKS CONSTRUCTION CO., SECURITY PAVING CO., INC.;

and

NATIONAL LABOR RELATIONS BOARD; *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF IN OPPOSITION.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12;

Petitioners,

vs.

GRIFFITH COMPANY; J. W. NICKS CONSTRUCTION CO., SECURITY PAVING CO., INC.;

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NATIONAL LABOR RELATIONS BOARD;

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF IN OPPOSITION.

The Respondents oppose the Petition for Writ of Certiorari for the reasons presented below.

OPINION BELOW.

By its judgment and order, the United States Court of Appeals for the Ninth Circuit has remanded this case to the National Labor Relations Board for further proceedings. (Petitioners' Brief for Writ of Certiorari, Appendix A, pp. 20a-21a.)[1]

QUESTIONS PRESENTED.

1. Whether the Supreme Court should grant certiorari in this case where the judgment and order of the United States Court of Appeals is not final.

2. Whether certain clauses in a construction industry collective bargaining agreement constitute an agreement whereby certain employers agree to cease or refrain from dealing in the products and services of other employers and to cease doing business with such employers within the meaning of Section 8(e) of the National Labor Relations Act, as amended (29 U.S.C. 158(e)).

STATUTES INVOLVED.

The second question presented by this petition involves Section 8(e) of the National Labor Relations Act, 61 Stat. 140, as amended by 73 Stat. 543-544 (29 U.S.C. 158(e)), which provides in relevant part as follows:

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract or agreement, express or implied, whereby

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[1]All further page references are to the Appendices to Petitioners' Petition for Writ of Certiorari, unless otherwise noted.

such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work: . . . ."

STATEMENT OF THE CASE.

The essential facts in this case were undisputed.

Urban Pacific, an employer in the construction industry, was signatory to a collective bargaining agreement with Local Union No. 12 I.U.O.E. (the Union). Sometime during the course of its operations, Urban Pacific adopted a labor relations policy under which it would engage in successive breaches of its collective bargaining agreement with the Union by failing to make its proper monthly reports and payments to the fringe benefit Trust Funds (Petitioners herein). The Union and its Trust Funds were unable to pressure Urban Pacific directly to comply with its collective bargaining obligations and its delinquencies to the Trust Funds continued to mount. During January, 1973, a Trust Fund field representative discovered Urban Pacific performing jobsite construction work under subcontract for J. W. Nicks Construction Co. (Nicks). Further investigation revealed that Urban Pacific had

had other subcontracts with Security Paving Co., Inc. (Security), Griffith Company (Griffith) and Sukut-Coulson, Inc. (Sukut). Shortly thereafter, the Union and its Trust Funds invoked paragraphs 15 through 16(a) of the collective bargaining agreement between Griffith, Nicks and Security and the Union. Thereafter, these employers were coerced by Petitioners into paying Urban Pacific's past accrued Trust Fund contributions. Paragraphs 15 through 16(a) read as follows:

> "15. The Trustees of the Trust Funds, through their Administrator, shall furnish each Contractor Association and the Union with a list of delinquent contractors each month. The Contractor agrees that he will not subcontract any portion of his job to any Contractor whose name appears on the delinquency list unless said Contractor has paid all delinquent monies to the various Trust Funds.
>
> (a) Any disputes between the parties concerning the payment or non-payment of monies due the Trust Funds are not subject to Article V [grievance procedure] of this Agreement.
>
> 16. In the event the Contractor subcontracts to any such delinquent Subcontractor, in violation of the foregoing, the Contractor shall be liable to the Trustees for all accrued delinquencies of the Subcontractor and shall withhold sufficient funds from monies due or to become due such Subcontractor and shall pay the sums over to the Trust Funds. If a Subcontractor becomes delinquent after commencing work for the Contractor, the Contractor shall be liable for all delinquencies incurred on the job after ten (10) days following the date of the delinquency list on which the

Subcontractor's name first appeared. The Contractor shall terminate the contract of the Subcontractor who fails to promptly correct his delinquency.

(a) Where the Contractor fails or refuses to make payment required under the above provisions, the Union shall have the right to withhold services from any or all jobs of such Contractor."

In the proceedings below, a bare majority of the National Labor Relations Board (the Board) found that paragraphs 15 through 16(a) of the collective bargaining agreement, on their face, constituted an agreement whereby certain employers agreed to cease doing business with other employers. (pp. 23a-24a). The Board went on to hold, however, that, notwithstanding the presence of this cease doing business objective, the clauses were lawful. The Board did so because it was unwilling to impute to Congress an intent to hinder or impede what it termed "necessary and commendable" efforts to maintain and improve fringe benefits through efficient collective activities.

The Board's Administrative Law Judge recommended dismissal of the unfair labor practice charges on somewhat different grounds. He found that the clauses at issue were "clearly designed" to put "pressure" on delinquent subcontractors through non-delinquent general contractors.[2] (pp. 40a-41a). He concluded also

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[2]Respondents submit that he could not have found otherwise, having heard, *inter alia,* the uncontradicted testimony from the Union Treasurer, Verne W. Dahnke, as follows: "So, what we are really saying, is that we don't want them [general contractors] tc contract to [sic] a subcontractor unless the guy is making arrangements to pay his bills." (Verne W. Dahnke is also one of the petitioning Trustees herein, characterized at p. 26 of the Petition ". . . as independent fiduciaries [pursuing] the rights and interests of trust participants and beneficiaries").

that (1) the relevant work unit was the collective bargaining unit; (2) that employees of Griffith, Nicks and Security were in one large collective bargaining unit; and (3) that employees of Urban Pacific were in a different and smaller collective bargaining unit. (pp. 71a-72a). The Administrative Law Judge, nevertheless, sustained the clauses as lawful "union standards" clauses since, in his view, they served to protect negotiated fringe benefit programs of all "bargaining unit" workmen.

The somewhat divergent legal conclusions of the Board majority and its Administrative Law Judge were both analyzed and disposed of by the Court of Appeals. With regard to the Board's legal analysis, the Court of Appeals held that the Board was in error in creating a new "commendable objective" exception to Sections 8(e) and 8(b)(4)(B) of the Act. The Court noted, "We do not read it [*National Woodwork*][3] as construing Section 8(e) to prohibit only secondary activity for undesirable or reprehensible ends. Congress has over the years struck a delicate balance of power between labor and management. Unions may engage in concerted coercive activities against primary employers only; secondary pressures are forbidden even where a union has the *commendable objective* of improving the wages and working conditions of union members generally." (Emphasis added) (p. 18a).

As to the union standards defense relied upon by the Administrative Law Judge, the Court of Appeals found that defense could not be interposed in the factual context of this case. The Court observed that

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[3]*National Woodwork Manufacturers Association v. N.L.R.B.*, 386 U.S. 612 (1967).

the "tactical object" of the boycott was to influence the labor relations policies of Urban Pacific, i.e., the Union was attempting to remedy and correct the conduct of Urban Pacific and other delinquent employers through Griffith, Nicks, Security and other non-delinquent employers. The Court pointed out that it was Urban Pacific with which the Union has a dispute and not with these other neutral employers. (p. 13a). Certainly, application of the union standards defense in this context would allow "the union to cast its protective net too widely," (p. 14a), i.e., cause Griffith to pay for fringe benefits accruing at other times, places, projects and involving other general contractors not in the remotest way related to the maintenance of union standards on the Griffith project.[4] The Court of Appeals concluded, therefore, that the clauses reach across bargaining unit lines and are designed to benefit union members generally, a secondary objective. (pp. 14a-15a.)

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[4]The Griffith project was fully completed several months before the Petitioners invoked paragraphs 15 through 16(a) of Griffith's collective bargaining agreement. (p. 59a). Also, the uncontradicted evidence showed that some members of other crafts, e.g., Teamsters, Carpenters and Laborers, participate in the Trust Funds and members of the Union in other industries, such as mining, asphalt manufacturing and rock and sand production, participate as well.

ARGUMENT.

REASONS FOR DENYING THE WRIT.

A. The Order Below Is Non-Final.

In the proceedings below, the Board found it unnecessary to pass on two substantial legal issues, viz., (1) whether the clauses are saved from the prohibitions of Section 8(e) of the Act (29 U.S.C. 158(e)) by the first proviso thereto (known as the construction industry proviso), and (2) whether the Union can be said to have threatened, coerced and restrained Griffith, Nicks and Security within the meaning of Section 8(b)(4)(ii)(B) of the Act (29 U.S.C. 158(b)(4)(ii)(B)). The Board did not decide these issues because of its fundamental legal error in finding that the clauses and their enforcement were lawful primary activity. The Court of Appeals remanded these "Remaining Issues" to the Board for its review and decision. (pp. 20a-21a). Thus, the Court of Appeals scrupulously followed the dictates of this Court as reiterated in *South Prairie Construction Co. v. Local 627 International Union of Operating Engineers,* 425 U.S. 800, 96 S.Ct. 1842, 1845 (1976), that is, having corrected the Board's legal error, the Court of Appeals remanded the case to the administrative agency to decide the remaining legal issues.

Respondents submit that Supreme Court review should not be had, at least at this stage of the proceedings, as such review may serve only to affirm the Court of Appeals order to remand the case to the Board for further proceedings. Subsequent action by the Board may make review by this Court unnecessary, or may alter the issues so that neither party may desire review. Further, the Board should have an oppor-

tunity to re-examine its position in light of the opinion of the Court of Appeals.

All of the considerations which have persuaded this Court of the wisdom of its general policy to deny petitions from non-final judgments and orders, such as the conservation of judicial resources, are applicable in this case. There are no extraordinary circumstances to remove this case from the application of the rule. We, therefore, urge the Court to follow its general practice and deny the Petition for Writ of Certiorari from this non-final order. *Brotherhood of Locomotive Firemen and Enginemen, et al. v. Bangor & Aroostock Railroad Co., et al.*, 389 U.S. 327 (1967); see *Hamilton-Brown Shoe Co. v. Wolf Brothers & Company*, 240 U.S. 251, 257-258 (1916).

B. This Court Has Amply Expressed Itself Concerning the Primary Issue Resolved in the Court Below and Further Elucidation Is Not Required.

As recently as last term, this Court, in *N.L.R.B. v. Enterprise Association*, ... U.S. ...., 97 S.Ct. 891, reiterated the familiar dual factor *National Woodwork* test of primary and secondary activity, viz., . . . "whether under all the surrounding circumstances the union's objective was preservation of work for the [general contractors] employees, or whether the agreements and boycott were tactically calculated to satisfy union objectives elsewhere."[5]

The clauses in this case, on their face and in practice, require one group of non-delinquent employers, such as Griffith, Nicks and Security, to boycott delinquent

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[5]*National Woodwork Manufacturers Assn., supra* n.3 at pp. 644-645 (footnote omitted).

subcontractors. Obviously, the Union is not attempting to influence the labor relations policies of Griffith, Nicks and Security, the boycotting employers. Manifestly, the Union's "tactical object" is to remedy and correct the offending labor relations policy of the boycotted employer, Urban Pacific.

In *Enterprise Association, supra,* the Court dealt with an admittedly lawful work preservation clause, i.e., a clause designed to prevent the employer from eliminating the work of union members. Here, however, the clauses do not, on their face or in practice, preserve work opportunities for the members of the Union. The stipulated facts showed that Urban Pacific was at all times signatory to a collective bargaining agreement with the Union (p. 54a), including, *inter alia,* the requirements of that agreement that all work be performed by members of the Union. Thus, it could not be reasonably concluded that the Union was attempting to guard against technological changes that could eliminate jobs. In *Enterprise Association, supra,* the Court, relying on the circumstantial evidence test of right of control, inferred that the "tactical object" of the plumbers union was to influence the policies of the general contractor, Austin. This was true even though the Union there had sought in a direct and immediate way to benefit the employees of the boycotting employer.

Respondents submit, therefore, that *Enterprise Association* applies *a fortiori* where, as here, (1) the work opportunities go to members of the Union in any case, and (2) the direct and "substantial evidence" as found by the Administrative Law Judge, the Board and the Court of Appeals showed that the clauses

have *an object*, if not the sole object, of influencing the offending labor relations policies of Urban Pacific by using Griffith as its tool to achieve that objective.[6]

The Trustees persist in their question-begging contention that they have a problem collecting promised fringe benefit contributions from "fly-by-night" employers and, therefore, any means for accomplishing this commendable end should be lawful. But, as the Court of Appeals concluded in substance (pp. 18a-19a), in the final analysis, it is the Union that negotiates the labor agreements with financially unreliable employers and has failed to develop an efficient system and/or the personnel to police these labor agreements once negotiated. Respondents submit that Petitioners should look not to innocent and non-delinquent employers to save them from improvident collective bargaining relationships. The "worthy motive" of reducing delinquencies does not give the Petitioners a license to violate other laws. (See, also *Riverton Coal Company v. United Mine Workers*, 453 F.2d 1035, 1040 (C.A. 6), where, as ought to be the case here, certiorari was denied (407 U.S. 915, 1972).)

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[6]Also in Enterprise Association (97 S.Ct. at 904, n.17), the Court reiterated "It is not necessary to find that the *sole* object of the strike was secondary so long as one of the union's objectives was to influence another employer [Urban Pacific] by inducing the struck employer [Griffith] to cease doing business with that other employer. See *NLRB v. Denver Building and Construction Trades Council*, 341 U.S. 675, 689, 71 S.Ct. 943, 951, 95 L.Ed. 1284 (1951). See also *Wilson v. Milk Drivers and Dairy Employees, Local 471*, 491 F.2d 200, 203 (C.A. 8, 1974); *Riverton Coal Co. v. United Mine Workers of America*, 453 F.2d 1035, 1040 (C.A. 6) cert. denied, 407 U.S. 915, 92 S.Ct. 2439, 32 L.Ed. 2d 690 (1972); *NLRB v. Milk Drivers and Dairy Employees, Local 584*, 341 F.2d 29, 32 (C.A. 2), cert. denied, 382 U.S. 816, 86 S.Ct. 39, 15 L.Ed. 2d 64 (1965)."

C. Response to Ancillary Issues Raised by Petitioners.

Before concluding, two ancillary issues raised by Petitioners should be briefly commented upon.

The petitioning Trustees contend that they were somehow placed on the sideline in the Court of Appeals.[7] Petitioners neglect to inform the Court, however, that they, the Trustees, participated in the oral argument in the Court of Appeals. The Trustees also filed extensive briefs in reply to the original Petition for Review and, in fact, filed a Petition for Rehearing and Suggestion for Rehearing En Banc. In point of fact, the Trustees have not been on the sideline at all, but have, as they continue to do here, consistently and vigorously attempted to exculpate the Union from its unfair labor practices.

The Petitioners also complain about the timeliness of the Petition for Review. The Court of Appeals for the Ninth Circuit held that the gap in Section 10 of the National Labor Relations Act (29 U.S.C. §160) would be filled by applying the rule of laches. (pp. 4a-5a, n.3). In so doing, the Court of Appeals for the Ninth Circuit agreed with the Seventh Circuit in the only other reported case on this subject, viz., *Kovach v. N.L.R.B.*, 229 F.2d 138, 141 (1956), which rule was justifiably relied upon by Respondents. In neither their affidavits and moving papers nor at oral argument did the Union or the Trustees offer specific proof of how they had been prejudiced or changed position by a short delay, nor could they have done so. Indeed, the Board, itself, opposed the motion to dismiss.

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[7]The Trustees are merely third party beneficiaries of a few provisions of a collective bargaining agreement. *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960), and they were not charged with having committed an unfair labor practice.

CONCLUSION.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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